IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1231

TEXACO INC., SUNRAY DX OIL COMPANY, HUMBLE OIL & REFINING COMPANY, UNION PRODUCING COMPANY, EDWIN L. COX, SOHIO PETROLEUM COMPANY, GULF OIL CORPORATION AND LAMAR HUNT,
Petitioners,

v.

FEDERAL POWER COMMISSION, THE UNITED GAS IMPROVEMENT COMPANY, THE BROOKLYN UNION GAS COMPANY, PHILADELPHIA ELECTRIC COMPANY, LONG ISLAND LIGHTING COMPANY, AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondents.

SUPPLEMENT TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This Supplement sets forth the legal authorities and other relevant factors which establish that the instant Conditional Cross-Petition has been timely filed.

The judgment of the court below was entered on December 9, 1966. Petitions for certiorari were filed from such judgment in Nos. 1133, 1134 and 1135 on March 9, 1967, the last day of the 90-day period prescribed by 28 U.S.C. § 2101(c). No Petition was filed within such period by

Cross-Petitioners (producers) who are supporting the action of the court below. Our Conditional Cross-Petition was filed on April 7, 1967, within the 30-day period provided by Rule 24 and concurrently with the filing of our Briefs in Opposition to the Petitions filed in Nos. 1133, 1134 and 1135. This procedure conforms to that approved by this Court in *Ray, et al.* v. *Robert L. Pierson, et al.*, No. 1155, October Term, 1965, cert. granted 384 U.S. at 938. Moreover, it was necessitated by the unique and complex interrelationship of certain separate holdings of the court below which interrelated holdings are attacked only in part in Nos. 1134 and 1135.

1. In the *Ray* case, a civil action for damages subject to the ninety-day statutory time period prescribed by 28 U.S.C. § 2101(c), the judgment of the court of appeals was entered October 25, 1965. Robert L. Pierson, *et al.* made timely applications for, and received, an extension of time within which to petition for a writ of certiorari until February 28, 1966, on which date their petition was filed (No. 1074, October Term, 1965). J. L. Ray, *et al.* did not apply for an extension of time within which to file a cross-petition for certiorari. However, after both the initial statutory ninety-day period and the extension period granted to Robert L. Pierson, *et al.*, expired, J. L. Ray, *et al.*, filed, on March 26, 1966, a cross-petition for a writ of certiorari seeking review of a question not raised by the petition in No. 1074. On May 16, 1966, both the petition for writ of certiorari in No. 1074 and the cross-petition for writ of certiorari in No. 1155 were granted. 384 U.S. 938.

2. The issue raised by the instant Conditional Cross-Petition did not become ripe for review at the time judgment was entered by the court below. It will be presented for the first time if this Court should grant the Petitions in Nos. 1134 and 1135 and reverse the lower court's holding

affirming the Federal Power Commission's (Commission) determination as to the proper initial certificate price.[1] Therefore, the time for filing Petitions directed to a contingent issue of this nature should not be strictly controlled by the ninety-day period prescribed in 28 U.S.C. § 2101(c).

The Commission in the instant case reached its decision by utilizing the evidence presented by its Staff and excluded the evidence introduced by cross-petitioners. The court below held that this procedure was legally available to the Commission and we do not now challenge this holding. However, the Petitions in Nos. 1134 and 1135, this Term, do not present the question of *which* type of evidence the Commission should have used, but only whether the evidence introduced by its Staff was *adequate* to support the Commission's decision. By our Conditional Cross-Petition, we simply wish to insure that should this Court grant certiorari on the initial price issue raised in Nos. 1134 and 1135, it will be in a position to fully consider all aspects of this matter. If this Court should conclude that the lower court erred in finding that the Commission's initial price determination was supported by substantial evidence, it may not be able to correct that court's additional error resulting from its disposition of the interrelated question involving the exclusion of producer's evidence, if such matter is not raised until Respondents' Answer on the merits. Generally, Answers are confined to defensive matters and are not the appropriate vehicle to request affirmative relief with respect to the holding below. *Alaska Industrial Board* v. *Chugach Electric Association*, 356 U.S. 320, 325 (1958).

3. Alternatively, we ask for a thirty-day extension of the ninety-day period within which to file our Conditional

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[1] See Footnote 1, page 2 of our initial Conditional Cross-Petition.

Cross-Petition. 28 U.S.C. § 2101(c.) Such an extension is warranted in view of the fact that the issue covered by the Conditional Cross-Petition was not raised until the Petitions in Nos. 1134 and 1135, this Term, were filed on March 9, 1967.

Respectfully submitted,

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